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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 607

PAUL A. PIGOTT, EUGENE E. MURPHY, WILLIAM F. MENARD, FRANK R. McNABB, VINCENT W. BAUMIA, ERNEST E. LAMB, HAROLD HATCHER, JR., THOMAS R. HALL, PAUL EVANS, HENRY J. BARROW, and MILTON E. STONE,
Petitioners,

vs.

DETROIT, TOLEDO & IRONTON RAILROAD COMPANY, a Corporation, and BROTHERHOOD OF RAILROAD TRAINMEN,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE BROTHERHOOD OF RAILROAD TRAINMEN IN OPPOSITION

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OPINION BELOW

Th opinion of the District Court, dated November 10, 1953, granting defendant's motion to dismiss for want of jurisdiction over the subject matter, is reported at 116 F. Supp. 949. (The cause is now pending on appeal in the Court of Appeals for the Sixth Circuit.)

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254(1), 62 Stat. 928.

QUESTION PRESENTED

Does a United States District Court have jurisdiction, whether by review or originally, of the subject matter of a controversy respecting compliance by railroad employees with a union shop agreement, executed pursuant to the provisions of the Railroad Labor Act?

STATUTES INVOLVED

Title 28, U. S. C., Section 1337:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Title 45, U. S. C., Section 152 and 153 (Railway Labor Act, Sections 2 and 3).

The Union Shop Amendment to the Railway Labor Act, as amended, which was enacted in 1951, appears as Section 152 Eleventh of the Act.

Section 153 Second authorizing the establishment of system boards of adjustment reads:

> "Nothing in this section shall be construed to prevent any individual carrier, system or group of carriers and any class or classes of its or their em-

ployees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come within the jurisdiction of the Adjustment Board."

Section 8, Norris-LaGuardia Act, 29 U. S. C. A., Section 108.

STATEMENT OF THE CASE

The statement of the case as presented by petitioners (Petition, pages 6-14) is substantially correct.

However, certain corrections and additions should be made. The System Board hearing herein, pursuant to which the discharge of the plaintiffs was ultimately had, was not precisely concerned with whether or not the United Railroad Operating Crafts was "national in scope." Nor did the plaintiffs' discharge turn on such a finding. The System Board ruled, rather, that the plaintiffs had not shown compliance with the union shop agreement in that (a) they acknowledged their non-membership in the Defendant Union, the certified bargaining agent, but (b) failed to present evidence establishing their membership in some other labor organization, national in scope and organized in accordance with the Railway Labor Act, whether United Railroad Operating Crafts or any other.

Following the ruling by the System Board, the plaintiffs commenced the instant action seeking, *inter alia*, injunc-

tive relief against the discharge of the plaintiffs by the defendant railroad. The Defendant Brotherhood moved to dismiss, for reason of the court's lack of jurisdiction over the subject matter. The Defendant Brotherhood asserted, in addition to those grounds set forth at page 10 of plaintiffs' petition, directed chiefly to the exclusive and final jurisdiction of administrative tribunals under the Railway Labor Act as to controversies arising thereunder, that * * * "The plaintiffs, before seeking injunctive relief have not made every reasonable effort to settle their dispute, either through negotiations or the full utilization of administrative or extra-judicial remedies, inclusive of presentation to the Board of Adjustment of substantial proof of compliance with the terms of the union shop agreement, contrary to the requirements of Section 8 of the Norris-LaGuardia Act, 29 U. S. C. A., Section 108"; and that "The plaintiff fails to state a claim upon which relief can be granted."

Thereafter, the District Court granted the motion to dismiss, and denied subsequent motions of the plaintiffs for reconsideration, or, alternatively, amendment and the impanelling of a three-judge court. The plaintiffs thereafter appealed to the Court of Appeals for the Sixth Circuit. Subsequent to the proceedings in the Court of Appeals set forth at page 14 of plaintiffs' petition, including the denial by the Chief Judge of a restraining order pending appeal and the vacation of a temporary order theretofore entered, the plaintiffs filed two motions with the Court of Appeals. The first was a "Motion for Extension of Time for Filing of Briefs Pending Disposition of [a then proposed, now the instant] Petition for Certiorari" under Rule 39 of the United States Supreme Court; and the second, a "Motion for Leave to Withdraw Transcript of Record for Printing" in conjunction with that proposed

petition. Following responsive pleadings and arguments by all parties, the Court of Appeals, in Order dated February 19, 1954, ruled: "* * * (3) The motion for leave to withdraw the transcript is denied; (4) The motion to extend the time for filing of the appellees' [sic] brief until 20 days after a final disposition by the United States Supreme Court on a proposed petition for certiorari is denied; (5) The time for the filing of the appellants' brief is extended from February 22, 1954 to March 15, 1954 * * *'.' (A motion by the Defendant Brotherhood to correct the record and restrict issues on appeal was postponed for consideration, by the same order, until the hearing on the merits. That motion seeks to strike from the record and from all consideration by the Court of Appeals the plaintiffs' motion for reconsideration and other relief, the denial by the District Court of that motion, and the plaintiffs' appeal from that order of denial. The Brotherhood alleges in its motion that the District Court's order denying the plaintiffs' motion was unnecessary and improper, and the appeal similarly improper and out of time.)

Notwithstanding the ruling of the Court of Appeals, denying plaintiffs' application to withdraw the transcript of record for printing in conjunction with the then proposed petition for certiorari, the instant petition was subsequently filed.

ARGUMENT

I.

COMPANION PETITIONS TO THE INSTANT PETITION FOR CERTIORARI WERE DENIED BY THIS COURT ON MARCH 15, 1954.

As asserted in petitioners' application, the instant petition is a companion to three others previously pending before this Court: *United Railroad Operating Crafts v. Wyer,* in the Second Circuit, Petition No. 472; *United Railroad Operating Crafts v. Northern Pacific Railway,* in the Ninth Circuit, Petition No. 513; and *United Railroad Operating Crafts v. The Pennsylvania Railroad Company,* in the Seventh Circuit, Petition No. 548. All of these companion petitions were denied by this Court on March 15, 1954. The considerations which led to the denial of those petitions are equally applicable here.

II.

THE PETITIONERS HAVE NOT COMPLIED IN PRESENTING THE INSTANT PETITION WITH THE REQUIREMENTS OF RULES 38 AND 39 OF THIS COURT'S RULES REQUIRING THE FILING OF A CERTIFIED TRANSCRIPT OF RECORD.

In this cause, petitioners are seking in the instant petition review of the decision of the United States District Court for the Eastern District of Michigan, Southern Division, that it was without jurisdiction of the subject matter. The Court of Appeals for the Sixth Circuit, to which petitioners have appealed, has this case docketed before it. It may be exected that the case will be heard shortly by the Court of Appeals, inasmuch as attempts by the petitioners, in effect, to stay proceedings in the Court of Appeals pending disposition of the instant motion by this Court, were denied.

Petitioners predicate their instant petition upon Rule 39. That Rule provides that "Proceedings to bring up to this Court on writ of certiorari a case pending in a circuit court of appeals or the United States Court of Appeals for the District of Columbia, before judgment is given in such court, should conform, as near as may be, to the provisions of Rule 38; and similar reasons for granting or refusing the application will be applied."

Rule 38, paragraph one, in turn requires that a petition for review by certiorari "shall be accompanied by a certified transcript of the record in the case, including the proceedings in the court to which the writ if asked to be directed." Reference is made in Rule 38, 1, to Rule 38, 7, on printing the record. The latter paragraph requires that all initial printing of the record be had under the supervision of the Clerk of this Court, though "* * * where the record has been printed for the use of the court below and the necessary copies as so printed are furnished, it shall not be necessary to reprint it for this court, but only to print such additions as may be necessary to show the proceedings in that court and the opinions there."

The petitioners have not remotely complied with these mandatory requirements.

First, no certified transcript of the record has been presented to the Clerk of this Court for filing or printing. Second, while the plaintiffs have themselves printed a document purporting to be a "transcript of record," as purportedly printed for use in the Court of Appeals, that document consists only of an uncertified, printed copy of the "Appendix to Brief of Plaintiffs-Appellants" in the Court of Appeals. Third, the very inclusion of approximately two-thirds of the material in the Appendix as the purported record before the Court of Appeals is itself one of the issues, on appeal, before that court! Finally, absolutely

none of the "proceedings of the court to which the writ is asked to be directed," i.e., the Court of Appeals of the Sixth Circuit, are to be found within the purported printed record, in unquestioned contravention of Rule 38.

That our foregoing conclusions are correct, and that the defects are incapable at this stage of being remedied, are best confirmed by the plaintiffs' own proceedings in the Court of Appeals. The plaintiffs did, on February 10, 1954, file with the Sixth Circuit a "Motion for Leave to Withdraw Transcript of Record for Printing." That motion was a companion motion to another seeking to defer the need for the filing of briefs in the Court of Appeals until ultimate disposition of the instant petition for certiorari under Rule 39, which the plaintiffs then contemplated filing. The motion was in entirety as follows:

> "Plaintiffs-appellants respectfully move this Court for an order authorizing the withdrawal from the Office of the Clerk of the Transcript of Record in this cause, filed on January 21, 1954, so as to permit counsel for plaintiffs-appellants to have printed the portions of the Transcript already designated in Appellants' *Notice Pursuant to Rule 21f of this Court of Parts of Record Appellant Proposes to Print.*
>
> "It is the intention of plaintiffs-appellants to file in the United States Supreme Court, at the earliest practicable time, a Petition for a Writ of Certiorari prior to judgment in this Court, as authorized by Rule 39 of the Rules of the Supreme Court. In conjunction with such Petition, Rule 38 of the Rules of the Supreme Court requires the filing of a certified copy and nine additional printed copies of the record.
>
> "In order to facilitate the prompt preparation and filing of such Petition and printed record, plaintiffs-appellants' counsel therefore are requesting

that the Transcript of Record on file in this Court be made available to them. As soon as printing is completed, the Transcript of Record will be returned by Registered Mail and a printed copy supplied to the Clerk of this Court in order that he may thereupon certify it to the United States Supreme Court."

On February 19, 1954, the motion was denied. In proceeding as they do, petitoners are acting in obvious conflict with the ruling and intent of the Court of Appeals. Moreover, in the light of that Court's ruling on their motion, together with the court's reserving for its later consideration and later determination the propriety of the inclusion in the record on appeal of such a substantial portion of the plaintiffs' appendix, the petitioners necessarily misrepresent the nature of the document they have caused to be printed and have here designated "transcript of record." Finally, of course, they act fully contrary to that which they have themselves acknoweldged to be minimum and necessary procedure in connection with this petition, under the rules of this Court.

Petitioners have clearly failed to comply with the essential requirements of Rule 38, paragraphs 1 and 7.

III.

THIS CAUSE DOES NOT SATISFY THE REQUIREMENTS OF RULE 39, RESPECTING DIRECT REVIEW BY THIS COURT OF A DISTRICT COURT DECISION, WHERE APPEAL IS PENDING BEFORE A COURT OF APPEALS.

This petition is extraordinary in that it seeks review of a District Court decision prior to judgment in the Court of Appeals, ostensibly pursuant to the provisions of Rule 39 of this Court.

While Rule 39 permits in certain cases the presentation of petitions for certiorari in cases pending in a

Court of Appeals before judgment in such a court, petitioners' application[1] certainly discloses no basis to support their bare conclusion that the public interest for prompt settlement prior to judgment of the Court of Appeals exceeds in this case in any way the public interest in the prompt settlement prior to judgment in a Court of Appeals of any other cases pending before such a court and involving federal legislation. Indeed, in this case, in the Sixth Circuit, and in *United Railroad Operating Crafts v. The Pennsylvania Railroad Company* (pending in the Seventh Circuit; certiorari just denied in this Court, No. 548), both Courts of Appeals, in denying the plaintiffs' motions in each case (in effect) to stay proceedings in the Courts of Appeals until the disposition of the respective applications for certiorari in each case, under Rule 39, before this court, quite apparently agreed with the respective defendants' contentions that Rule 39 may not properly here be invoked. For as we argued below, as did the defendant union similarly in the Seventh Circuit case, "Plaintiffs-Appellants' motion, however, discloses no basis upon which the granting of certiorari by the Supreme Court [under Rule 39] may reasonably be anticipated and therefore by its terms no basis upon which an extension of time to permit the implementation of such a petition may be granted." This Court, in denying the petition in No. 548, has obviously agreed.

It is obvious that the procedure under Rule 39 is not intended for use in any or every case. The Supreme Court has stated concerning its power to grant certiorari before judgment that "this is a power not ordinarily to be exercised." *The Three Friends,* 166 U. S. 1. Where

[1] While petitioners argue by reference to other petitions previously pending before this Court, we have not been served with copies of those petitions.

certiorari prior to judgment has been granted in the public interest questions of great importance requiring prompt settlement were involved such as the constitutionality of the "Gold Clause," *Norman v. Baltimore & Ohio R. Co.*, 55 S. Ct. 407; the constitutionality of the Railroad Retirement Act of 1934, *Railroad Retirement Board v. Alton Railroad Company*, 55 S. Ct. 758. See *Robertson* and *Kirkham*, Jurisdiction of the Supreme Court of the United States, by Richard F. Wolfson and Philip B. Kurland (1951) at pp. 235, 236. The petition of plaintiffs-appellants does not suggest an issue of emergency and public importance comparable to the issues involved in the above cited cases. Nor, the companion petitions having been denied, can any argument be made that all causes be heard together.

See also *United States v. Montgomery Ward and Company*, 324 U. S. 858, 65 S. Ct. 862, 89 L. Ed. 1416 (1945). "Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied, for the reason that application has been made prior to judgment of the Circuit Court of Appeals." At page 858.

See also *Robertson* and *Kirkham supra*, at page 235: "Although the authority to issue a certiorari to bring up a case pending in, and not yet decided by, the Court of Appeals has been in existence since 1891, writs are rarely issued in such cases, and indeed, are not frequently applied for."

IV.

THERE IS NO CONFLICT BETWEEN COURTS OF APPEALS ON THE QUESTION PRESENTED.

The petitioners sought to impress this court with an ostensible need that their application be granted because similar issues were presented in other then-pending petitions. However, as noted above those applications have, since the filing of the petition herein, all been denied. *United Railroad Operating Crafts v. Wyer,* in the Second Circuit, Petition No. 472; *United Railroad Operating Crafts v. Northern Pacific Railway Company,* in the Ninth Circuit, Petition No. 513; and *United Railroad Operating Crafts v. The Pennsylvania Railroad Company,* in the Seventh Circuit, Petition No. 548.

The fact that several applications for certiorari were previously pending did not, without more, prove anything more than that which has always been true in the multiplicity of suits commenced by United Railroad Operating Crafts—if U. R. O. C. was not national in scope, perhaps its attorneys were. For, in every case except one (*United Railroad Operating Crafts, et al., v. The Pennsylvania Railroad Company, et al.,* commenced in the United States District Court for the Northern District of Illinois, Eastern Division)[2], in which decision was had, the respective District Court, including the instant one, ruled that it was without jurisdiction of the subject matter, and that the controversy was properly and exclusively for the administrative agencies and procedures provided by the Railway

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[2] *U. R. O. C., et al. v. Pennsylvania Railroad Company,* U. S. D. C., N. D., Ill., E. Div., No. 52 C 1456, unreported, pending before U. S. Ct. of Appeals, 7th Cir., No. 10914, cert. den. U. S. S. Ct., Pet. No. 548, March 15, 1954.

Labor Act.[3] The rulings of the New York and Washington District Courts were affirmed on appeal by the Courts of Appeal of the Second and Ninth Circuits, respectively.[4] No other appellate court ruled otherwise. An Ohio ruling was not appealed.[5] In the Illinois case, *supra*, the District Court in taking jurisdiction ruled against the plaintiff's contentions on the merits, as did the National Railroad Adjustment Board, an administrative agency existing under the Railway Labor Act, which similarly ruled against the plaintiff's contentions, on the merits, in a case before it.[6]

The ultimate fact then becomes that there is no conflict between any of the circuits, and, except as indicated, there is no conflict at all. This is accordingly not an appropriate case for this Court to take jurisdiction.

V.

THE PETITIONERS ARE SEEKING TO RAISE HERE CONSTITUTIONAL ISSUES, AND OTHER MATTERS NOT BEFORE THE DISTRICT COURT.

In their petition, and in their presentation of the Questions Presented, petitioners constantly refer to matters not appropriately before the court. For example, there

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[3] *U R. O. C., et al. v. Wyer, et al.*, 115 F. Supp. 359, 205 F. (2d) 153 (U. S. D. C., S. D., N. Y., aff'd. Ct. App. (2d Cir.)), cert. den. U. S. S. Ct., Pet. No. 472, March 15, 1954; *U. R. O. C., et al. v. New York, New Haven and Hartford Railroad Company, et al.*, 205 F. (2d) 153 (U. S. D. C., S. D., N. Y., aff'd. Ct. App. (2d Cir.)), cert. den. U. S. S. Ct., March 15, 1954; *U. R. O. C., et al. v. Northern Pacific Railway Company et al.*, 208 F. (2d) 135 (U. S. D. C., W. D., Wash., aff'd. Ct. App. (9th Circ.)), cert. den., U. S. S. Ct., Pet. No. 513, March 15, 1954; *Lake, et al., v. Baltimore & Ohio Ry. Co.*, 31 L. R. R. M. 2656 (U. S. D. C., S. D., W. Div., Ohio, Civil No. 3049) (appl. dis. by stipulation).

[4] See footnote 3.

[5] See footnote 3.

[6] *Brotherhood of Locomotive Firemen and Enginemen v. Chi., B. & Q. R. Co.*, First Division, N. R. A. B., Docket No. 3074.

is a reference to alleged lack of due process before the system board, and under the processes of the Railway Labor Act. These issues are not encompassed by the pleadings, were not presented to the District Court, except in connection with a motion, after judgment, which was denied, asking leave to amend in order to raise constitutional issues and asking the impanelling of a three-judge court. While petitioners first acknowledge, with some emphasis, at pages 15 and 16 of their application, that "they do not seek review by this petition of the District Court's denial of leave to amend by adding a second count to the complaint," which second count concerned constitutional issues, they immediately ignore their self-imposed and conceded restriction of issues before this Court. Only constitutional issues raised below are before this Court on appeal. *Shelley v. Kraemer,* 334 U. S. 1, 8; *Duigan v. United States,* 274 U. S. 195, 200.

Moreover, petitioners contend that the instant cause should somehow, more than various of the other United Railroad Operating Crafts cases formerly pending on petition for certiorari, be taken for review. But the reason offered is that the System Board here sat, and "the Court will have before it, as part of the record (R. 107a-181a), the transcript of the hearing before the System Board of Adjustment." In the instant case, of course, a System Board hearing was held. Apart from the obvious, that whether the decision or transcript of the System Board is subject to review is *the* issue on appeal, so that argument by reference to it (the transcript) fully begs the issue, the transcript certainly is not a part of the record before this Court in connection with the instant petition, if indeed, it is even a part of the record before the Court of Appeals. For the fact is that the transcript of the System Board hearing was appended, as an exhibit, to plaintiffs' proposed amended complaint in the District Court,

which amendment the District Court denied. Petitioners concede that that denial is not here for review; obviously, then, it is improper for petitioners to argue in connection with this petition, and it would be improper to argue on review itself, by reference to pleadings and exhibits whose filing the District Court refused. Not merely is such argument improper here, but as we have previously pointed out, plaintiffs in referring to the transcript of the System Board, are alluding to portions of their "transcript of record" whose very inclusion in the record before the *Court of Appeals* is one of the issues before that court (because of questions of late entry of the District Court Order denying amendment, etc., and other questions not before this court).

VI.

THE DECISION OF THE DISTRICT COURT WAS CORRECT

The decision of the District Court is supported by the statutes and judicial authorities. Many other district courts, and the Courts of Appeal of the Second and Ninth Circuits, have, as above set forth, specifically passed upon the issues of this case in suits brought by the plaintiffs' union, and, with the single district court exception noted, agreed that the federal courts are without jurisdiction of the subject matter of this type of dispute.

As the District Court observed, the entire structure of the Railway Labor Act contemplates the administrative determination of questions arising under the Act. So, under the Act, the National Railroad Adjustment Board (or, alternatively, by agreement to that effect by the carrier and union, any system group, or regional board) is authorized *exclusively* to hear disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or

application of agreements concerning rates of pay, rules, or working conditions. *Slocum v. Delaware L. & W. R. Co.*, 339 U. S. 239; *Order of Railway Conductors of America v. Southern Railway Co.*, 339 U. S. 255; *Order of Railway Conductors of America v. Pitney*, 326 U. S. 561. Moreover, awards of the National Railroad Adjustment Board, or by extension, of a system board, "shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award." 45 U. S. C. A., Section 153, First (m).[7]

As the District Court observed, "the union shop provision of an agreement, executed in conformance with the Act, concerns a rule or working condition governing the employment relationship, and dispute as to whether an employee should be discharged for failure to comply with such a provision of the agreement is a dispute between an employee and a carrier involving the interpretation and application of an agreement concerning a rule or working condition. The hearing of such a dispute, therefore, is within the exclusive province of the adjustment board."

Here, there was such a union shop provision, whose language almost exactly paralleled that of the 1951 Union Shop amendment to the Railway Labor Act. The validity of that union shop agreement has never been challenged (except, insofar as the agreement goes on to vest jurisdiction in a system board as to determination of the compliance question). The sole ultimate question therefore

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[7] As stated in *Missouri-Kansas-Texas R. Co. v. Brotherhood Ry. & S. S. Clerks*, 188 F. 2nd 302, 305:

> "There is no question now but that the courts have absolutely no jurisdiction to interpret agreements between carriers and their employees or to settle disputes arising out of the construction of such agreements. That principle has been so firmly established by a series of decisions construing Section 3 of the Railway Labor Act that we deem it unnecessary even to cite authorities."

is of the plaintiffs' compliance with that agreement. It is clear under the cited authorities that the district court was without initial or "appellate" jurisdiction, the question being one for the exclusive determination by the administrative agencies of the Railway Labor Act.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for certiorari should be denied.

Respectfully submitted,

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